STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	**1993 OAL Determination No. 3**
Request for Regulatory Determination filed by JOHN F. ORNELAS concerning the alleged underground "one-time rule" the STATE DEPARTMENT OF SOCIAL SERVICES uses to prohibit community care facility operators from charging residents for damages they cause, except for the first time[1]	**[Docket No. 90-018]** **April 8, 1993** **Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: JOHN D. SMITH, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
BARBARA STEINHARDT-CARTER, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the State Department of Social Services rule which prohibits community care facility operators from charging residents for damages they cause, except for the first time, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

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The Office of Administrative Law has concluded that this "one-time rule" is a "regulation." The Department of Social Services agrees that the unadopted "one-time only" exception is a "regulation," and has stated it intends to stop using the exception to the rule, but has not addressed its underlying prohibition on charging for damages.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been asked to determine[3] whether or not the "one-time rule" (articulated by the Department of Social Services in a September 9, 1988, letter) and the underlying policy prohibiting licensed residential care facilities from charging their residents for damages, together referred to as the "challenged rule," are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA") before the Department may enforce them.

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the APA;

(2) the challenged rule and policy are "regulations" as the key provision of Government Code section 11342, subdivision (b), defines "regulation";

(3) no exceptions to the APA requirements apply;

(4) the challenged rule violates Government Code section 11347.5, subdivision (a). [9]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
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> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing both OAL review and other APA requirements, the Legislature enacted Government Code section 11347.5. Section 11347.5 generally prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also authorizes OAL to issue a

regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

Following an executive branch reorganization in 1978, the Department of Social Services ("Department") replaced the Department of Benefit Payments. The Department, within the Health and Welfare Agency,[11] supervises the delivery of cash assistance and social services to needy persons in California.[12]

In 1973, the Legislature enacted the Community Care Facilities Act[13] ("CCF Act") to ensure that residents of state hospitals and others needing social services and treatment would have access to safe, alternative community-based housing offering an appropriate range of high-quality care.

Authority [14]

The CCF Act charges the Department with licensing and evaluating community care facilities. Specifically, section 1530, Health and Safety Code, provides:

"The state department shall adopt, amend, or repeal, in accordance with [the APA] such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of this chapter . . . . "

Background: This Request for Determination

On April 30, 1990, John F. Ornelas ("Requester"), Administrator of a community care facility licensed by the Department, requested that OAL determine whether the Department may legally enforce its rule that "a licensee cannot charge a client for any damage(s) caused by the client" without adopting that rule pursuant to the APA. The Requester enclosed a License Report citing him for violating the challenged rule; correspondence between Requester and the Department; several provisions of California regulations and statutes; and other background items.

The Department sent the Requester a copy of a September 9, 1988, letter it had written to Assemblymember Bruce Bronzan, setting out the "Department's policy relating to client-caused damages in a residential care facility." The Department's letter stated, in relevant part:

> "There is no statute or regulation that allows the licensee to charge a client for damages, even on a one time basis. When a licensee determines that he/she can meet the needs of a client and accepts the client, it is the responsibility of the licensee to provide adequate care and supervision to meet the client's needs, including needs associated with destructive behavior. In other words, the licensee is responsible for all damages caused by the client."

"However, the Department has chosen to give the licensee the benefit of the doubt when he/she has not been advised about client behavior. This policy is, in our mind, fair since the licensee often receives clients without full knowledge of their destructive behavior either because placement is unaware or because of the fear that a client would not be accepted for care and supervision. Once the client's behaviors are known, it is up to the licensee to decide whether or not to retain the client, assume the responsibility for necessary supervision and the potential damage which may occur.

"If the licensee charges a client on a one time basis, the Personal and Incidental monies of SSI/SSP[15] clients cannot be used since the Welfare and Institutions Code prohibits their use."

The Requester's admission agreement required prospective clients to agree to reimburse the facility on demand for property damage. The Department cited Requester for a licensing deficiency, noting that "the difficulty with the admission agreement" is that it uses "a practice that is inconsistent with the so called "One Time Rule" and "a violation of our regulations . . . ." (March 14, 1990, Letter from Department's San Diego District Office to Requester).

The Requester's challenge has two parts: Is the underlying policy prohibiting reimbursement a "regulation" which the Department cannot enforce without adopting it as a regulation in accordance with the APA? And is the one-time exception to that prohibition also a "regulation"?

Procedural Background: On March 18, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[16] along with a notice inviting public comment. OAL received no public comments. The Department[17] submitted its response to the request for determination ("Response") on May 19, 1991.

In its Response, the Department reiterated the position it had stated in the 1988 letter that "no statute or regulation . . . allows a licensee to charge a client for damages, even on a one time basis." The Department concludes:

> "This Department has considered the validity of the 'One-Time Rule' in light of the requirements of Government Code Section 11347.5. We have determined that the 'One-Time Rule' as utilized by this Department is a regulation within the meaning of subsection (b) of Government Code Section 11342. The 'One-Time Rule' has not, however, been adopted as a regulation by this Department. This Department has accordingly determined that our utilization of the 'One-Time Rule' is prohibited by Section 11347.5. We will cease utilization of the 'One-Time Rule' promptly, as soon as the field staff of our Community Care Licensing Division can be notified of this decision."

The Department also explained that, upon examination, it believes that a rule permitting any charges for damages against a residential care client would conflict with the governing statutes. The Department believes that it may interpret the law in only one way: to prohibit facility operators from charging residents for property damage incidental to their care.

II. ISSUES

The key issues in this determination are:

(1) WHETHER THE APA GENERALLY APPLIES TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN AN EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA GENERALLY APPLIES TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

> "As used in this title ['Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

This statutory definition applies to the APA, that is, it helps determine whether or not a particular "state agency" must adhere to the APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also part of Title 2 of the Government Code: Chapter 3.5 of Part 1 of Division 3.

The APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. In Government Code section 11342, subdivision (b), the APA provides that the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."[18] Since the Department is not in the judicial or the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to its quasi-legislative enactments.[19]

Further, as noted above, Health and Safety Code section 1530 specifically mandates the Department to " . . . adopt, amend, or repeal, in accordance with [the APA] such reasonable rules, regulations, and standards as may be necessary or proper to carry out the purposes and intent of [the CCF Act] . . . [emphasis added]."

Thus, the APA applies to all state agencies, except those "in the judicial or legislative departments." The Department is in neither the judicial nor the legislative branches of state government. Its enabling statute expressly requires it to comply with the APA when it adopts rules. Therefore, we conclude that the APA rulemaking requirements generally apply to the Department.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,[20] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either
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> o a rule or standard of general application or
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> o a modification or supplement to such a rule?
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> Second, has the challenged rule been adopted by the agency to either
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> o implement, interpret, or make specific the law

enforced or administered by the agency or

- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][21]

A. Is the Challenged Rule a Standard of General Application or a Modification or Supplement to Such Rules or Standards?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[22] There is no doubt that the Department intends the challenged rule (now, *without* the one-time exception) to apply generally, throughout the State, to all operators of licensed community care facilities.

B. Part Two - Does the Challenged Rule Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Governs the Agency's Procedure?

Yes. The underlying policy prohibiting compensation and its one-time exception interpret and make specific the law the Department administers in two ways. First, the underlying rule interprets the law as prohibiting licensed community care facility operators from charging residents for damages they cause. Secondly, the "one-time" portion of the rule further interpreted and implemented the CCF Act by creating an exception to the prohibition which permitted recovery for the first instance of damages only.

ANALYSIS UNDER THE TWO-PART TEST LEADS US TO CONCLUDE THAT THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN AN EXCEPTION TO THE APA REQUIREMENTS.

Government Code section 11346 specifically states that APA requirements apply to any exercise of quasi-legislative power unless "expressly" exempted by the Legislature.[23]

The meaning of the word "expressly" seems clear. According to the American Heritage Dictionary,[24] "expressly" means "definitely and explicitly stated." It also means "in an express or definite manner; explicitly." In a usage note under the word "explicit," the American Heritage Dictionary states:

> "Explicit and express both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. Explicit applies more particularly to that which is carefully spelled out: explicit instructions. Express applies particularly to a clear expression of intention or will: an express promise or an express prohibition." [Underlined emphasis in original; capitalized emphasis added.]

According to Black's Law Dictionary, "express" means:

> "clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Made known distinctly and explicitly, and not left to inference. . . . The word is usually contrasted with 'implied.'" [Emphasis added.][25]

Numerous statutes demonstrate that when the Legislature wants to exempt expressly an agency from the APA, it knows which words to use.[26]

The Department does not argue explicitly that any of the established general exceptions to the APA apply.[27] In fact, as noted, the Department concedes that the portion of the challenged rule which created a one-time exception is a "regulation" as defined. The Department claims that the underlying rule is not a

regulation because it is the only possible interpretation of the applicable law, particularly Welfare and Institutions Code section 11006.9. Where a rule of general application is the only possible interpretation of a statute, the agency need not adopt an identical regulation under the APA to "implement, interpret, or make specific" that rule since existing law already contains the requirement.[28]

Thus, the issue is whether existing California law, either statute or regulation, prohibits a CCF operator from seeking compensation for damages a resident causes to the CCF?[29]

DISCUSSION

Does any California statute or regulation prohibit a community care facility (CCF) operator from seeking compensation from a resident who causes damage to the CCF? In other words, does the contractual relationship between CCF operator and resident, for services specified by law and contract, for an agreed price, preclude the operator's recovery for damages inflicted by the resident? In order to answer this question, we must determine:

** whether the "basic services" covered by the basic contract price and mandated by law include all injury or property damage a resident may cause the CCF?

** if *some* damages fall outside the "basic services" covered by the contract, may a CCF operator seek compensation from a resident? (that is, is the resident responsible for *any* damages which fall outside the scope of the contracted and legally mandated "basic services"?)

** if the operator may seek compensation, from what resident resources may he or she recover?

General Tort Principles Civil Code section 3523 states: "For every wrong there is a remedy." Civil Code section 3520 provides that: "No one should suffer by the act of another." These maxims of jurisprudence are to "aid in the just application" of the other applicable principles of law. CC section 3509. With respect to damages for wrongs, specifically torts, Civil Code section 3333 ("Torts in General") provides:

> "**Breach of obligation other than contract**. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Absent a clear statutory exception or a valid contract to the contrary, the fundamental principle of liability will apply. One can see how this responsibility is applied or abrogated by statute or contract in various special relationships, such as between landlord and tenant, hotel keeper and guest, or other property owners and roomers or lodgers. We have been unable to find any general legal principle which would automatically absolve a community care facility resident of all responsibility for any kind of damages he or she causes. Thus, we need to examine the special relationship between community care facility operators and their CCF residents.

Special contractual and statutory relationship between CCF operator and resident Numerous statutes as well as rules adopted pursuant to the APA define the special contractual relationship between the care home operator and the resident. First, the operator may not charge more than the contracted price for anything included in "basic services."[30] Secondly, the operator may not take money from a resident's "P & I" (personal and incidental monies) for "an additional cost of care."[31] The operator may not use a resident's cash resources to pay for any basic services.[32]

"Basic services" include "those services required by applicable law and regulation to be provided by the licensee in order to obtain and maintain a community care facility license."[33] Section 80078(a), 22 CCR, requires that "the licensee shall provide care and supervision as necessary to meet the client's need." If the CCF cannot meet the resident's needs, then the operator may request the resident to relocate or may evict the resident.[34] And section 80001c.(2), 22 CCR, defines "care and supervision" by setting out a long, non-inclusive list of types of assistance, as well as items and activities such as "maintenance of house rules for the protection of clients;" "supervision of client schedules and activities;" and "providing basic services as defined in Section 80001(b)(2)."

The "basic rate" is "the rate charged by the facility to provide basic services."[35]

III. SUMMARY

General tort principles permit a property owner to recover from a tenant, boarder, lodger, or hotel guest who damage his or her property. No statute or regulation directly prohibits the CCF operator from obtaining compensation for some damages, under some circumstances, from some, although limited, resident or client resources. The law is ambiguous: on the one hand, nothing apparently prevents a CCF operator from charging a resident for damages outside the scope of the "basic services" or "care and supervision" which the contracted rate fully covers. On the other hand, the law does clearly prohibit an operator from recovering for the "cost of care" or a "basic service" from a resident's P & I money or "cash resources." The underlying public policy strongly suggests that the operator has no right to obtain any additional compensation, from any source, for any service covered by the basic or contracted-for rate. The law does not indicate whether an operator may recover from any source at all for damages which were not part of the basic contracted services. Even more importantly, the law does not unambiguously define precisely what "basic services" include.

The Department may have the power to adopt a rule defining "basic services" in such a manner that they expressly include any damage a resident may inflict on the CCF operator's property. This rule would interpret the Community Care Facilities Act in light of general California tort law, and would make specific the Department's policy decision that when the CCF operator and resident enter into an admission agreement specifying the basic rate and basic services, the contracted rate must cover any damage the resident may cause.

Existing statutes and regulations do not necessarily dictate this outcome, although the Department could possibly fashion an appropriate regulation interpreting the law in this manner.[36] Thus, the Department's rule (prohibiting recovery under all circumstances and from all resident resources) is not the only tenable interpretation of the applicable law and not exempt on that basis from the requirements of the APA.

HAVING FOUND THE CHALLENGED RULE TO BE A "REGULATION" AND NOT EXEMPT FROM THE REQUIREMENTS OF THE APA, WE CONCLUDE THAT THE CHALLENGED RULE VIOLATES GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the APA;

(2) the challenged rule, both the basic policy prohibiting community care facility operators from recovering from residents for damages and the "one-time" exception to the rule, are "regulations" as the key provision of Government Code section 11342, subdivision (b), defines "regulation";

(3) no exceptions to the APA requirements apply;

(4) the challenged rule violates Government Code section 11347.5, subdivision (a).

DATE: APRIL 8, 1993

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1. This Request for Determination was filed by John F. Ornelas, Residential Care Providers Association, 6876 Bluefield Court, San Diego, California 942120. The Department of Social Services was represented by Lonnie Carlson, Interim Director, Department of Social Services, 744 P Street, Sacramento, CA 95814, (916) 445-2077.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "97" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1993 OAL Determination No. 3** (Social Services).

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be

enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, review denied, the California Court of Appeal, Third District, held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In *Engelmann*, the Third District expressly overruled its 1973 decision in *American Friends Service Committee v. Procunier* insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Third, in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993, the California Court of Appeal upheld **1989 OAL Determination No. 4**, which found that regulatory portions of regional water quality control plans (or "basin plans") were subject to the APA. Fourth, in *Department of Water and Power v. State of California Energy Resources and Conservation Commission* (1991) 2 Cal.App.4th 206, 3 Cal.Rptr.2d 289, 301, the Court found the challenged interpretations inconsistent with the statute, avoiding the APA compliance issue.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion, stating that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption"as a regulation" Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356. According to Government Code section 11370:

> "Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL (916-323-6225) for a small charge.

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation[']as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

"1. File its determination upon issuance with the Secretary of State.

"2. Make its determination known to the agency, the Governor, and the Legislature.

"3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

"4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

"1. The court or administrative agency proceeding involves the party that sought the determination from the office.

"2. The proceeding began prior to the party's request for the office's determination.

"3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation[']as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431; 268 Cal.Rptr. 244, 249, review denied.

11. Welfare and Institutions Code section 10600.1.

12. Id.; Welfare and Institutions Code section 10600.

13. Health and Safety Code sections 1500-1567.8.

14. OAL does not review alleged underground regulations for compliance with APA's six substantive standards

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six

substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. "SSI/SSP" refers to the federal Supplemental Security Income program under Title XVI of the Social Security Act (42 USC 1381 et seq.) and the State Supplementary Payment Program (also referred to as the "state supplementation program" or the "supplementary state program," resulting in "state supplemental payments") for the aged, blind, and disabled (Welfare and Institutions Code section 12000 et seq.). In any case, the state-funded "SSP" program supplements federal SSI benefits. Eligibility for these means-tested public assistance programs rests both on the recipient's condition--age, blindness, or disability--and on his or her financial need.

16. California Regulatory Notice Register 90, No. 50-Z, December 14, 1990, p. 1873.

17. The Response was submitted on behalf of the Department by Lonnie Carlson, then Interim Director of the Department.

18. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition) (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993.

19. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

20. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

21. Supra, 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.

22. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

23. In 1947, the Legislature enacted the following APA provision:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

In 1947, the above provision was numbered Government Code section 11420. Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, this section was reenacted unaltered, except for renumbering as section 11346. Section 11346 thus represents a clear and strong legislative policy of 42 years standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.

24. 2d College Ed. (1982), pp. 478-79.

25. (5th ed., 1979) at p. 521; see Ganyo v. Municipal Court (1978) 80 Cal.App.3d 522, 529, 145 Cal.Rptr.636, 640. Under the heading "express authority," Black's also states:

> "An authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given." (Emphasis added.)

26. For example, see Welfare and Institutions Code section 11275.30(c)(3), exempting particular regulations from OAL review; Welfare and Institutions Code section 11350.6(n), exempting specified fees from APA procedures altogether; and Welfare and Institutions Code section 11350.6(r), exempting particular emergency rules from

APA requirements.

27. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216

Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451; typewritten version, pp. 175-177. Like Grier v. Kizer, **1991 OAL Determination No. 6** rejected the idea that City of San Joaquin (cited above in this note) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Two indexes are currently available. One covers calendar years 1986-88, the second covers 1989 and 1990. The 1991-1992 index should be available in mid-April 1993. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $162.

Though the Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

28. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr.244, the Court wrote:

> "The Department further submits there was no need to promulgate a regulation because the only legally tenable interpretation of its statutory auditing authority is that statistical sampling and extrapolation procedures must be utilized. The argument is without merit. While sampling and extrapolation may be more feasible or cost-effective, it does not follow that such method is the sole *tenable* interpretation of Welfare and Institutions Code sections 14133 and 1410 [emphasis in original]." Without a detailed discussion, the Court does appear to accept the implicit hypothesis that if an interpretation were the only legally tenable interpretation of the statutes in question, then it would be unnecessary for the agency to promulgate a regulation restating that sole legally tenable interpretation.

See also Engelmann v. State Board of Education (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-75. The court in National Elevator Services, Inc. v. Director of Industrial Relations (1982)136 Cal.App.3d, 186 Cal.Rptr. 165 rejected an uncodified agency interpretation of Labor Code section 7309 as "untenable," as not "justified by the legislative language or legislative history . . . ." 136 Cal.App.3d at 138; 186 Cal.Rptr. at 169. The "only legally tenable" interpretation concept is discussed in Respondent's Brief dated May 5, 1992, pp. 36-41 in State Water Resources Control Board v. Office of Administrative Law, California Court of Appeal, First Appellate District, Division One, Case No. AO54559.

29. Here we follow the analytical method of Justice Frank Newman, writing in Armistead v. State Personnel Board (1978) 22 Cal.3d 198, Sup., 149 Cal.Rptr. 1. The Armistead court first concluded that the disputed manual provision was invalid, not having been adopted in accordance with the requirements of the APA, and that this unadopted "rule" merited no weight as an administrative interpretation since it had not been duly promulgated. Then, the court analyzed the law which applied to the situation--that of an employee tendering, then withdrawing, his resignation--and held that "unless valid enactments provide otherwise," the employee could withdraw his resignation under the specified circumstances. Id at 206; 5. Likewise, absent a validly adopted rule interpreting the law otherwise, we rely on the existing state of the law.

30. 22 CCR 80001b.(1) and (2) and 80068(b).

31. Welfare and Institutions Code section 11006.9.

32. 22 CCR 80026(f).

33. 22 CCR 80001b.(2).

34. 22 CCR 80078(b).

35. 22 CCR 80001b.(1).

36. OAL cannot determine the consistency of such a rule until and unless the Department has adopted and submitted it, with the complete rulemaking file, to OAL in compliance with the requirements of the APA.